Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term 1997

ATHI NARAYAN

Petitioner,

v.

ST. CHARLES HOSPITAL

Respondent.

Petition for Writ of Certiorari
To The United States Court of
Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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1. QUESTION PRESENTED FOR REVIEW

1. Is it a denial of Petitioner's due process rights to a trial by jury under the Sixth Amendment to the United States Constitution for a Court to enter a summary judgment dismissal against Plaintiff's (Petitioner) Complaint in circumstances where there are substantial factual issues and factual differences in the evidence as to essential matters of the case filed under Title VII, U.S.C. 2000(e)(2) (and other claims).

2. LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Petitioner (Plaintiff) - Dr. Athi Narayan, M.D.

Respondent (Defendant) - St. Charles Hospital

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I. IS IT A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS TO A TRIAL BY JURY UNDER THE SIXTH

AMENDMENT TO THE UNITED STATES CONSTITUTION FOR A COURT TO ENTER A SUMMARY JUDGMENT DISMISSAL AGAINST PLAINTIFF'S (PETITIONER) COMPLAINT IN CIRCUMSTANCES WHERE THERE ARE SUBSTANTIAL FACTUAL ISSUES AND FACTUAL DIFFERENCES IN THE EVIDENCE AS TO ESSENTIAL MATTERS OF THE CASE FILED UNDER TITLE VII, U.S.C. 2000(e)(2) (AND OTHER CLAIMS).

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4. OPINIONS BELOW

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(b) Opinion of U. S. Court of Appeals (Sixth Circuit) in Case No. 97-3042, dated 07/02/98 (See Appendix pp 1-2)

In The

SUPREME COURT OF THE UNITED STATES

October, 1997 Term

ATHI NARAYAN

Petitioner,

vs.

ST. CHARLES HOSPITAL

Respondent.

On Petition for a Writ of Certiorari

5. STATEMENT OF JURISDICTION

(A) The date of the judgment of the U. S. Court of Appeals (Sixth Circuit) was July 2, 1998

(B) Jurisdiction is based and requested under 28 U.S.C. 1954, etc.

6. CONSTITUTIONAL PROVISIONS, STATUTES & RULES INVOLVED

(a) Sixth Amendment to United States Constitution
(See Appendix p. 38)

(b) 42 U.S.C. 2000(e)(2)
(See Appendix p. 37)

(c) Federal Civil Rule 56(C)
(See Appendix p. 36)

7. STATEMENT OF THE CASE

Petitioner, Dr. Athi Narayan is a physician, a native of India, and a follower of the Hindu faith, and a specialist in neonatology (a highly-specialized area of treating new-born babies that are ill - a practice of which, for all realistic purposes, is limited in-house hospital practice.

From 1977-1987, Petitioner was employed as a neonatologist by the St. Paul Ramsey Hospital in St. Paul, Minnesota of Neonatology, earning $150,000 to 160,000 per year. His family was well-settled in the Twin Cities area, with his wife employed as an accountant, with his sons enrolled in high school in St. Paul.

On or about 1987, Petitioner was contacted by Respondent. In this regard, Respondent had no prior or real experience with a neonatology department and had to basically start from scratch to properly establish same.

When Petitioner was so contacted, he was not particularly eager to leave his position and situation at the

St. Paul Ramsey Hospital. One of the more critical aspects of the overtures made by Respondent to Petitioner was the promise and assurance of job security for Respondent with the further assurance of Respondent that Petitioner's position at St. Charles, if accepted, would be for the remainder of Petitioner's working career (unless a problem with Petitioner's medical competence arose, which never did in this situation).

After an initial rebuff by Petitioner, Respondent made yet another offer to Petitioner with a guaranteed income contract and a service contract as Director. These two separate contracts were for an initial period of three years, to be renewed automatically at the end of each term. Petitioner signed these contracts only after explicitly indicating to Respondent's representatives that he wanted an assurance that he would be able to work for Respondent for the remainder of his working career.

At this time, Petitioner was assured by Respondent

that Petitioner would be able to work up to his retirement.

After the contracts were signed by Petitioner, he resigned his established position, and his wife also resigned her position and his children had to change schools for the move to Toledo. Moreover, Petitioner sold his home in Minnesota and purchased a new home in Toledo.

Once Petitioner started his new position, he immediately commenced efforts to build the department of neonatology. These efforts included:

1. Organizing an administrative organization
2. Developing and training personnel
3. Developing a training program
4. Developing schedules
5. Developing a plan to attain Level II status for the neonatology department
6. Developing a coordination program with the Respondent's sister hospitals in Lima, Tiffin, Fostoria and Mercy Hospital in Toledo
7. Upgrading the medical capability of the neonatology department
8. Assisting in the education of resident

physicians at Mercy Hospital and neonatology service at Mercy Hospital

9. Coordinating physician education in obstetrics, pediatrics and family practice
10. Marketing work
11. Other areas, including establishing the public education programs.

In addition to the foregoing, Petitioner established a sleep apnea program at Respondent's Hospital to help understand infant crib death and sleep apnea. This program included many hours of additional uncompensated time over that contemplated by his contract, and this program became a successful institution at the Respondent's hospital and still exists today. In short, the Respondent's department of neonatology grew and developed under Petitioner.

Additionally, when the original three year contract period expired, Respondent tendered a second five year contract for Respondent's continued employment with Respondent, and Respondent at such time indicated

continued satisfaction with Dr. Narayan's performance. Once again, it was stated by Respondent's representatives to Petitioner just before this five year contract extension in 1991, that the length of the Petitioner's tenure would be for the remainder of his working career, but that Respondent was limited to written contracts of a five year term because of bonding requirements and could be assured of continued renewals of these contracts. Based on this assurance in 1991, Petitioner again signed another five year contract with Respondent.

During this second contract period, Petitioner accomplished the following:

1. Attained a Level II status for obstetrics and neonatology;
2. Helped a second neonatologist (Dr. Byrne) to get established at St. Charles in spite of opposition and concern about him by medical staff physicians who had concerns about him during his brief tenure at Riverside Hospital (3-4 months);
3. Expanded the sleep apnea program to cover patients from St. Vincent's Hospital;

4. Formalized several committees pertaining to perinatology and neonatology;
5. Established a transport team to transfer patients from the network hospitals to St. Charles Hospital;
6. Expanded educational activities to cover more physicians in related medical areas.

In 1992, during the second contract extension, Respondent hired Dr. Paul Byrne as the Assistant Neonatologist, under Petitioner. Dr. Byrne is a Caucasian and a Catholic. Differences occurred between Petitioner and Dr. Byrne over the care by Dr. Byrne of a terminally ill, brain-dead (comatose) child. This concern was initiated by the Petitioner over the concern that the care that was given was not medically or ethically proper. (i.e. fluid reduction to child and lack of communication to parents). As a result, Petitioner complained in the matter and encountered a backlash from the Respondent's administration in the process. By reason of these concerns, some officers at St. Charles appeared to side

with Dr. Byrne and Petitioner maintained that certain of the higher echelon officials sided with Dr. Byrne primarily by reason of the religious issues involved.

Approximately on or about May 13, 1994, just before the termination date of Petitioner's second written dual contracts, Petitioner was informed by an interview with Respondent's then existing C.E.O. that his tenure with Respondent would be terminated at the end of the fourth year. Nothing in the notice of termination was said about an adverse performance or negative problems, with no complaints about his performance having been received or warnings about department administration problems, and/or departmental financial problems or otherwise.

Obviously, when Petitioner received this notice, consternation struck and he immediately sought out reasons why he was being terminated, but did not receive direct or specific answers, but essentially at first encountered an impenetrable wall of silence. No time

previously did Respondent state to Petitioner that finances were a problem, but upon continued probing of Respondent by Petitioner's attorney and Petitioner there were vague insinuations of cost problems in the department.

In response to these statements about financial problems, Petitioner made several inquiries and overtures about working with Respondent at a reduced income rate. Petitioner offered salary reductions extending down to approximately one-half of his then existing compensation amount, along with several part-time programs all calling for salary reductions. Respondent remained silent on some overtures, rejected others, but never made counteroffers and essentially rejected every offer to discuss alternatives.

In regard to the financial concerns, there was an array of factors that were of significant concern at the time of Respondent's decision to terminate Petitioner's

employment. Some of these concerns, perhaps not being all of them, were addressed as stated.

In the final months of Petitioner's tenure with Respondent, it decided to hire a new neonatologist and to replace Petitioner. When this position was advertised, Petitioner was asked to submit an application as if he were a new applicant, even though he was still working at St. Charles Hospital. He did so submit an application yet nothing developed from his application and Respondent eventually decided to sub-contract with St. Vincent's Neonatology Group for neonatology coverage at a cost of $125,000.00. It is important to note in this respect that one of the proposals made to Respondent by Petitioner called for an annual fee of $125,000.00 to be paid to Dr. Narayan for neonatologist coverage purposes - yet there was no response given by Respondent to Petitioner's proposal. (This amount turned out to be the same amount Respondent is paying for the services of the St. Vincent

Hospital Neonatology Group for neonatology coverage — which does not even cover the ventilation of infants as did Dr. Narayan's proposal).

Because of the impasse that resulted, and after many attempts at resolution, the subject lawsuit was filed in the United States District Court (Northern District of Ohio, Western Division, Case No. 3:95CV7366. Summary judgment was granted to Defendant (Respondent) on December 20, 1996 dismissing Plaintiff's (Petitioner's) Complaint and Petitioner appealed to the U. S. Court of Appeal (Sixth Circuit), which denied Petitioner's Appeal.

8. REASONS FOR GRANTING THE WRIT OF CERTIORARI - ARGUMENT

I.

IS IT A DENIAL OF PETITIONER'S DUE PROCESS RIGHTS TO A TRIAL BY JURY UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION FOR A COURT TO ENTER A SUMMARY JUDGMENT DISMISSAL AGAINST PLAINTIFF'S (PETITIONER) COMPLAINT IN CIRCUMSTANCES WHERE THERE ARE SUBSTANTIAL FACTUAL ISSUES AND FACTUAL DIFFERENCES IN THE EVIDENCE AS TO ESSENTIAL MATTERS OF THE CASE FILED UNDER TITLE VII, U.S.C. 2000(e)(2) (AND OTHER CLAIMS).

1. General Legal Parameters Relative to Summary Judgment:

In any motion for summary judgment, the basic considerations must rise from the parameters of Federal Rules of Civil Procedure, Rule 56(C), which states in part as follows:

> ". . . A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. . ."

It is thus clear that in any motion for summary judgment, there must be an absence of a genuine issue of fact (as to material issues) and that a moving party is entitled to a judgment as a matter of law from such facts. In this regard, a motion for summary judgment requires the court to construe the facts (pertinent to such motion) most strongly against the party advancing the motion. In general, summary judgment is considered improper whenever the facts, as to key case elements, reveal a disparity between the versions of the respective parties. Alternatively stated, if a factual dispute exists as to essential issues, summary judgment is considered not proper. (See generally Alladin Plastics, Inc. v. Jerrold

Stephan Co.; CCA 9, 362 F2d 532.

2. **Relevant Substantive Law**

42 U.S.C. 2000e-2 provides in relevant part as follows:

> Employers. It shall be unlawful employment practice for an employer:
> 1. to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or
> 2. to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

This section forms the main basis of the Petitioner's first two causes of action.

In order for Petitioner to establish a prima facie case of racial discrimination (or religious discrimination) under 42 U.S.C. 2000(e)(2) he must establish certain factors:

a. that Petitioner is in a protected category or class,

b. That Petitioner was otherwise qualified for the position,

c. that Petitioner was replaced by a person outside the protected class or Petitioner sustained an adverse employment impact, which gave rise to an inference of discrimination. (See Texas Department of Community Affairs v. Burdine, 450 U.S. 792.)

Once Petitioner in a given case has demonstrated the above factors, he has established a prima facie case and the burden falls upon the Respondent to demonstrate that its actions were not basically rationalized by mere race or religion or national origin.

Essential facts in this case have been disputed. Upon termination of Petitioner's contract as of May 1995,

he was almost immediately replaced by Dr. Byrne, a Caucasian, Catholic and United States native (Petitioner being in a protected class by reason of race, religion, nationality, as stated above) as the Chief neonatologist and Neonatology Department Head, and assumed the responsibilities of such function. Respondent denied that Petitioner was so replaced and provided evidence alleging that no such replacement occurred contrary to Petitioner's position.

There was no issue as to Petitioner being otherwise qualified as a neonatologist and as the administrative head of Respondent's Department of Neonatology. At issue was whether Dr. Byrne assumed all the medical and administrative responsibilities of head of the Department of Neonatology.

It was also the position of the Petitioner in this matter that the Respondent has not provided proof of a justifiable basis for replacing Petitioner by Dr. Byrne, i.e.

the reason was pretextual and is not for reason as stated.

In this latter respect, as to the applicable legal parameters as a primary consideration, it is significant to note that at least two types of discrimination have been recognized by the courts: disparate treatment and disparate impact. As explained in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-336, n.15 (1977), disparate treatment arises when the employer simply treats a person in the protected class less favorable on the grounds of race, color, religion, or national origin. Disparate impact cases arise when an employer's practices, though facially neutral, fall more harshly on one group than another and cannot be explained away by business necessity. Id

In a case of disparate treatment, which the Supreme Court in Teamsters described as *the most obvious evil congress had in mind when it enacted Title VII.* Id. In order to prevail in such a case, an aggrieved

employee must prove discriminatory intent. This may be accomplished by presenting either direct or indirect evidence of discrimination. Without direct evidence of discrimination intent, indirect proof of discrimination will suffice. [Mauzy v. Kelly Services, Inc., 75 Ohio St. 3d 578 (1996)], quoting Kohmescher v. Kroger Co., 61 Ohio St. 3d 501, 505 (1991). Indirect evidence may be presented simply because direct evidence of intentional discrimination rarely presents itself; *In this respect, there will seldom be 'eyewitness' testimony as to the employer's mental processes* United States Postal Service Bd. of Governors v. Aikins, 460 U.S. 711, 716.

Id., 460 U.S. 711, quoting Eddington v. Fitzmaurice, 29 Ch. Div. 459, 473. Accordingly, it is well settled that proof of discriminatory motive *can in some situations be inferred from the mere fact of differences in treatment*. Teamsters, 431 U.S. 324, 335, n. 15, the usual approach in this respect involves the model of proof established in

Texas Dept. Of Community Affairs v. Burdine, 459 U.S. 792, 802, n. 13 (1973). Accordingly, the employee must first establish a prima facie case of discrimination, as discussed above. The employer then has the opportunity to demonstrate adequately that it had a legitimate reason for its actions. See Burdine, 450 U.S. at 254, n. 7; Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978). At this point, the employee must prove these reasons were pretextual.

3. **The Pretext Issue**

Respondent had asserted that Petitioner cannot adduce sufficient proof that his termination was pretextual (i.e. a reason without proper basis). Respondent contends that it had financial problems with the Department of Neonatology as the basis for terminating Petitioner. A review of the overall aspects of the Respondent's department and the Defendant hospital is essential in this light.

Respondent alleged that the Petitioner's salary was too high compared to the other neonatologists and that it had no choice but to discontinue Petitioner's services, in order to save overall costs in operating the Department of Neonatology. Petitioner maintains that there is more than just compelling evidence to sustain the existence of pretext on the part of Defendant in this regard. Generally, there were several aspects that yield strong evidence of such pretext, to wit:

a. The fact that many other departments at St. Charles Hospital had lost money - some at even greater rates than that of the neonatology department (if in fact the Neonatology Department lost money) and department heads in these departments who were white, Christian, Caucasians were not terminated.

a. The fact that in effect the Department of Neonatology did not lose money but had a positive impact from the services and monetary input it provided to other

departments.

b. The fact the Petitioner had brought in more money than Dr. Byrne overall for the Department of Neonatology.

c. The fact that when Respondent made its determination that the neonatology department was losing money. Petitioner made several offers to lower his income in order to help the Respondent keep costs down - one of the offers was to reduce to $125,000 his annual base compensation along with other financial aspects. (Which ultimately matched exactly the additional amount Respondent is presently paying to St. Vincent's to substitute and cover for Dr. Byrne.)

d. The fact that between years four and five of the second contract. Petitioner through his counsel made numerous offers to work out a reduced financial package to help the financial position of Respondent's hospital - none of which were ever responded to in a

positive way with counter proposals or to otherwise by Respondent. Indeed, the Respondent hospital just simply rejected every proposal or meeting without suggesting modifications or counter-proposals.

e. The fact that the Department of Neonatology losses (if any) were diminishing substantially from 1990 to 1995 while other department losses at Respondent were greater and increasing at a greater rate than the Department of Neonatology.

f. The fact that Petitioner's service contract with the Department of Neonatology was only $75,000 per annum as the Director of the Department of Neonatology and that he proposed to eliminate this service contract.

g. The fact that the Respondent hospital made other statements to Petitioner why he was being terminated.

h. The fact that the Respondent Hospital

spent close to $1,000,000 in 1995-1996 to remodel the neonatology and obstetrics departments at Defendant's hospital just immediately after it terminated Petitioner.

Each of these aspects will be discussed in specific detail.

(a) The History Of Losses in the Department

Respondent had stated the Neonatology Department had a history of losses even before Dr. Narayan came to St. Charles. The history shows that the profit and loss figures for the Department of Neonatology, among other of Respondent's departments, from 1985 to 1995, and for each of these 11 years there were alleged losses in the Department of Neonatology. Petitioner maintains that Respondent was aware of these loss factors from its own yearly report and it had to know if this alleged loss trend existed. Yet in face of the alleged losses in 1987 and 1988, Respondent elected to bring Petitioner to Toledo to work at its hospital. While full well knowing

this aspect, Respondent purposely and intentionally lured Petitioner to come to Toledo and guaranteed him $225,000 per year. Obviously, this gives rise to an estoppel against Respondent's financial claims as a basis to terminate Petitioner. However, it is also noted that these losses diminished substantially and started to become profitable (around 1994, 1995) for the Neonatology Department. What is more problematical is that Respondent decided to hire yet another neonatologist to add to these purported elevated costs factors.

(b) The Fact that Other Departments at Respondent Lost Money

Respondent had many departments, such as surgery, obstetrics, day care, etc. that traditionally lost money. According to the affidavit testimony of Mr. Harris, these "Loss" departments provide essential services to allow other departments to thrive profitably because of referrals. Moreover some of these "Loss" departments

(i.e. surgery) sustained heavier losses than those of neonatology, yet no efforts were made to terminate physicians in such departments.

Most significant in this regard is that for the pertinent years 1994 to 1995, St. Charles reaped a profit of approximately $3,000,000 on gross income of over $25,000,000 and neonatology finances were improving No way can it be expressed that Respondent had to make deep financial cuts to remain financially healthy in view of such financial situations.

(c) The Referral of Indirect Fees from the Department of Neonatology

Respondent has several departments that are indirect support departments. The revenue of these support departments depend entirely on referrals from the operational departments, such as Neonatology. Examples of such support departments at St. Charles include the laboratory, pharmacy, etc. The Department of

Neonatology contributed a substantial sum to these support departments during the years 1988 to 1995 and helped their profitability.

(d) The fact that Petitioner Generated More Income than Dr. Byrne

Respondent's position that it was more feasible to retain Dr. Byrne over Petitioner because of his lower salary ($183,000 compared to $225,000) was not substantiated by the circumstances.

(e) The Factor of the Financial Proposals Made by Petitioner

Petitioner made approximately five proposals to Respondent once he was told of the intent to terminate his service, as directed through his attorney or otherwise. These proposals addressed possible attempts to resolve the alleged loss situation. One called for Petitioner to work part-time for $125,000 per year, an approximate 40-50% reduction of income. Most disconcerting was that

Respondent refused to discuss the proposals or to make counter-proposals that would have proved a viable and effective basis for reduction of the costs in the Department of Neonatology. This adds extremely strong support to the conclusion that Respondent's alleged financial loss (as a basis) were clearly pretextual. This latter conclusion became even more undeniable when one further considers the fact that Respondent (after notice to Petitioner he was being terminated) then advertised for a new neonatologist to replace Petitioner at an approximate salary of $165,000 (and even after Respondent was made aware of Petitioner's annual salary proposals at the $125,000 range)

This latter aspects leads more solidly to the incredibility of Respondent's position, as further aggravated when Respondent ultimately contracted with St. Vincent's Hospital to have their neonatologist cover for Dr. Byrne (Dr. Narayan's replacement) for the amount of $125,000 annually, the same amount that Petitioner

already proposed for his reduced salary.

(f) The Factor that Respondent spent Approximately $1,000,000 to remodel the Department of Neonatology

Another factor that erodes the credibility of Respondent's claim that finances formed the primary basis for Petitioner's termination was the project undertaken by Respondent in 1995 and completed in 1996. In particular, Respondent (with planning started in 1994), consummated a remodeling project in the departments of neonatology and obstetrics at an overall cost of almost $1,000,000.00. It is inconceivable that Defendant's financial circumstances in the Department of Neonatology would be so diminished so as to relatively justify spending approximately $1,000,000.00 in the neonatology and obstetrics area for remodeling.

Thus, in view of the foregoing aspects, Respondent's financial concerns (in the Department of Neonatology) were clearly of not such a nature as to be

realistic - particular in the context and rationale of the discharge of Petitioner. By reason of this latter aspect and by reason of the fact that Petitioner had established that:

a. he was in the protected class; and
b. was otherwise qualified for the position; and
c. was in fact replaced by someone outside the protected class.

Respondent should not have prevailed on this claim and thus Respondent's summary judgment motion on this aspect should have been denied.

It is to be noted that Petitioner's Complaint in the United States District Court also comprised additional counts that involved matters of implied contract, unjust enrichment, and antitrust violations. The implied contract matters involved promises made to Petitioner (as stated above) that his contract would be automatically renewed at the end of each term. In this respect, Petitioner provided evidence to the effect that such assurances were

made and that he relied on these representations in continuing his relationship with Respondent. Respondent denied making such assurances. Moreover, as stated above, Respondent denied the evidence presented by the Petitioner to the effect that Petitioner was replaced by Dr. Byrnes (as Department Head) when he was terminated. As to the civil rights claims and implied contract matters, there were several other areas where differences arose between the factual evidence presented by Petitioner and Respondent.

At the trial court level, as well as in the United States Court of Appeals, Petitioner raised issues of whether the evidentiary differences between Petitioner and Respondent justified summary judgment in the subject case (under the purview of Federal Civil Rule 56). Extending this issue further, it is Petitioner's concern that summary judgment under the facts and status the subject case reaches into and violates Petitioner's due process

rights and jury trial rights (as subsumed under the Sixth Amendment to the United States Constitution). Petitioner contends that with the heavy emphasis on the use of summary judgment proceedings in civil cases, there are instances where summary judgment procedures, as implemented by the courts transcends the established constraints under Federal Civil Rule 56. It is the position of Petitioner that there is a substantial need for review of the summary judgment procedures, as presently handled in order to provide proper guidance for ruling upon such motions (in light of the potential conflicts with the due process and jury trial rights under the Sixth Amendment). This case, by the nature of the summary judgment process herein, provides an optimal vehicle for review of this issue.

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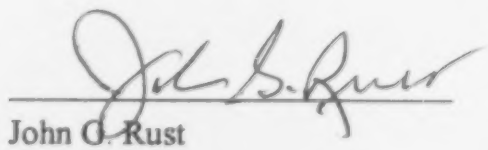
2. CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition was mailed to Rolf H. Scheidel, Attorney for Respondent, 1000 Jackson Street, Toledo, Ohio, 43624, this 30 day of November, 1998.



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